nying the right to the states to tax it, as a source of income merely, they should not only exempt the instruments of the state administration from specific taxation, by way of stamp or license duties, but they should not allow the National Government to impose a tax upon income arising from state salaries or from practice in the state courts, or from interest on money loaned the states, and various other sources analogous. But we do not think all this is demanded in order to create the practical independence of the state governments. And we look confidently for the ultimate adoption of a similar rule in regard to the right to tax the income from National stocks. I. F. R.

## *Supreme Court of Pennsylvania.*

### M'ENROY ET AL. *vs.* DYER.

It is too late to object to the competency of a witness after his testimony has been given and commented on to the jury by the party objecting.

In an action of trespass *de bonis asportatis*, the general rule for the measure of damages is the value of the goods at the time of the taking, or their highest value between that time and the trial, with interest and damages for any acts of outrage or oppression that may have accompanied the taking.

But where there has been a redelivery of the goods to the owner or a reacquisition by him, as by purchase at a sale, &c., the measure of damages is what it has cost him to regain possession, what he has lost by the temporary deprivation of the use of the goods, and such other damages as will make compensation for the injury.

Laying out of view what may be recovered in trespass for outrage or oppression in the taking, there is no difference in the measure of damages whether the action be trespass or trover.

The opinion of the court was delivered by

STRONG, J.—We do not perceive that the witness, Simon Barnes, had any interest such as to disqualify him from testifying in behalf of the plaintiff. If the property levied upon and sold under the execution against Barnes and Jennings was a part of the realty on the 29th day of May, 1855, when the assignment of the mills, buildings, and improvements was made to Dyer, clearly there was no warranty of title, and therefore no interest. If the articles levied upon had been detached before the assignment, and had become personalty, they were not embraced in the assignment, and in that case there was no implied warranty. In any aspect of the case the interest of the witness is not apparent. But were it not so, it was too late to ask the court to withdraw his testimony from the jury after it had been received

without objection, used by the plaintiffs in error and commented upon by them to the jury: *Rees* vs. *Livingston*, 5 Wright 119.

The only important question in the case is, whether the court below applied a correct rule for the assessment of damages. It was an action of trespass against a constable and another for levying upon and selling the plaintiff's goods under an execution against Barnes and Jennings.

The goods had been sold at the constable's sale, and there was some evidence they had been bought in for the plaintiff. The court instructed the jury that the measure of damages was not what had been paid at the constable's sale, but the value of the property at the time the sale was made, with interest thereon from that date. This was a correct enunciation of the rule as applicable to ordinary cases of trespass *de bonis asportatis*, but it is applicable only to cases where the owner has not regained possession of the goods before the trial. If, in this case, the property seized and sold by the constable was bought in by the plaintiff, or for him, at a price less than its value at the time of the seizure or the sale, that value was not in any just sense a measure of the injury caused by the act of the constable. What the law seeks to secure in an assessment of damages to an injured party is compensation. He can ask no more than to be made whole. In most instances a levy and sale of a plaintiff's goods for the debt of another deprives him entirely of the property, and nothing less than its value therefore would be compensation. But if there has been a redelivery to him, or if he has reacquired it, he may be compensated with less. He is then entitled to what it has cost him to regain possession, to what he has lost by the temporary deprivation of the use of the chattels, and to such other damages as are commensurate with the injury. No other rule than this will do complete justice, and it is supported by authority. In actions of trover it has often been held, that though there was a complete conversion, and though the general rule in the measure of damages is the value of the goods at the time of the conversion or the highest value at any time between the conversion and the trial, yet if they have been regained by the plaintiff before the trial, that fact goes in mitigation of damages. In such a case the value of the use of the goods during the period in which the plaintiff was deprived of possession, with any injury to the property itself, and the expense of recovering it, have been declared to be full compensation. In

*Cook* vs. *Hartle*, 8 Car. & Payne 570, a plaintiff was not allowed to recover the value of the goods which had been converted to the use of the defendant and afterwards returned. The same rule was held in *Moon* vs. *Raphael*, 2 Bingh. N. C. 310. In *Baldwin* vs. *Porter*, 12 Conn. 473, which was trover for saw-logs the defendants had seized in execution, and sold as the property of Birdsey Baldwin, it was held, the fact that Baldwin had bid in the property at the sale for the plaintiffs, who were the true owners, was admissible in mitigation of damages, and the real damages were declared to be the sum paid at the sale. The same doctrine was asserted in *Curtis* vs. *Ward*, 20 Conn. 204, and in Massachusetts in *Pierce* vs. *Benjamin*, 14 Pick. 361, and *Greenfield Bank* vs. *Leavitt*, 17 Pick. 161. So, also, in New York, *Reynolds* vs. *Shuler*, 5 Cowen 323; and in *Ewing* vs. *Blount*, 20 Alabama 694, the principle was asserted in strong terms.

These were actions of trover, it is true; but there is no reason for a different rule in trespass. In both the general principle is that a plaintiff is entitled to such damages as he has actually sustained. In both the value of the property lost by the plaintiff is the general standard of measurement of damages, laying out of consideration what may be recovered in trespass for acts of outrage and oppression accompanying the taking. What will make the plaintiff whole is the same in one form of action as in the other. No distinction is recognised by the courts. In *Baker* vs. *Freeman*, 9 Wendell 36, it was decided that where the goods of a party had been sold under illegal process, and they had been bid off at the sale by an agent of the owner who purchased for the benefit of his principal and paid his bid with the money of the principal, the measure of damages in an action of trespass was the amount of the bid and interest, and not the value of the property sold. And in *Brace* vs. *Head*, 3 Dana (Ky.) Reports 491, which was an action of trespass *de bonis asportatis*, for goods illegally sold on execution, it was holden that if the proceeds of the sale went to the plaintiff's benefit, this would operate to mitigate the damages: See, also, *Clark* vs. *Halleck*, 16 Wendell 607.

*Eby* vs. *Schumacher*, 5 Casey 40, cannot be regarded as asserting a contrary doctrine. There the goods had been seized *in transitu* to the owner as the property of a third person. An action of trespass was brought, and it was then agreed between the owner and attaching creditor, that the property might be

sold. But it was stipulated that the agreement should not in any measure affect the rights or vary the position of any of the parties. The sale was accordingly made, and the plaintiff became the purchaser. The sale was made for the benefit of the attaching creditors, for the property was deteriorating in value by being kept in package. The case was peculiar, quite unlike the present in its circumstances, and it is not to be understood as a denial of the doctrine generally recognised, that, in actions for damages for taking and carrying away, or for conversion of personal property, the rule that the value of the property at the time of the taking and sale or of the conversion, is the measure of damages, applies only to cases where the property has not been regained by the owner before the trial.

This qualification of the general rule escaped the attention of the learned judge of the Common Pleas. The case should have been submitted to the jury to find whether the articles sold by the constable, were bought by the agent of the plaintiff on his account. If they were, and the actual possession of the plaintiff was never disturbed, the measure of damages was the sum bid at the sale with interest, for that was the real extent of the injury the plaintiff had received.

The judgment is reversed, and a *venire de novo* awarded.

## RECENT ENGLISH DECISIONS.

### *V. C. Kindersley's Court.*

#### LOWNDES *vs.* BETTLE.

Where a plaintiff and his ancestors had been in possession of an estate for eighty years, and a defendant, claiming the estate under a title adverse to that of the plaintiff, threatened to take possession, cut sods, cut down trees, and perform other damage, in order, as he alleged, to assert his right, and to continue to bar the Statute of Limitations, the court granted an injunction to restrain the defendant from doing the threatened acts of injury, on the ground that the mischief to the estate would probably be irremediable.

The cases as to the jurisdiction of the court to interfere by injunction to restrain trespass, show that—

Where the defendant is in possession of the estate, and the plaintiff claims under an adverse title, the court will refuse to interfere except where the acts perpetrated or threatened are acts of such flagrant spoliation as to induce it to depart from the general principle.